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IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No. 499

META BIDDLE ROBINETTE,

Petitioner,

against

GUY T. HELVERING, Commissioner of Internal Revenue,

Respondent.

No. 500

ELISE BIDDLE PAUMGARTEN,

Petitioner,

against

GUY T. HELVERING, Commissioner of Internal Revenue,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

HENRY A. MULCAHY,
GUILFORD S. JAMESON,
Attorneys for Petitioners.

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Meta Biddle Robinette and Elise Biddle Paumgarten, by their attorneys, respectfully pray that writs of certiorari issue to review the judgments of the Circuit Court of Appeals for the Third Circuit, entered in the above-entitled causes on July 30, 1942, reversing the decisions of the United States Board of Tax Appeals made on July 8, 1941.

Nature of the Proceeding

The appeals instituted in the Board of Tax Appeals were to review deficiencies in Federal gift taxes for the year 1936 assessed by the Commissioner against the petitioners, Meta Biddle Robinette and Elise Biddle Paumgarten, in the amounts of $3,155.57 and $25,044.94, respectively.

By stipulation between the parties the cases were consolidated for briefing, hearing, argument and decision upon a single consolidated transcript of record in the Circuit Court of Appeals.

Opinions Below

The opinion of the Board of Tax Appeals in both cases is reported in 44 B. T. A. 701. The opinions of the Circuit Court of Appeals both upon the original appeal to that Court and upon the reargument therein are reported in 129 F. (2d) 832. (R. ffs. 3 to 9, 20 to 27, 39 to 42)

Jurisdiction

The judgments below were entered on July 30, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. (R. f. 38)

Questions Presented

(a) Whether the remainder interest under an irrevocable inter-vivos transfer in trust is taxable under Sections 501 et seq. of the Revenue Act of 1932, as amended, where the grantor provides that the income is to be paid to the grantor for life, then to two others for life, the remainder interest then to go to children, if any, when

they reach twenty-one, or, if none, then to the testamentary appointees of the survivor of the grantor and the two others with life interests.

(b) Whether the Commissioner in valuing a trust remainder for gift tax purposes must make due allowance for and deduct the value of a reversionary interest retained by the grantor.

Statement of the Matter Involved

The facts as found by the Board of Tax Appeals may be summarized as follows: (R. 4-7, 9-11)

Elise Biddle Paumgarten was, before her marriage, Elise Biddle Robinson. She is the daughter of Meta Biddle Robinette and the stepdaughter of Edward B. Robinette, all residents of Philadelphia, Pennsylvania. On January 6, 1936, when she was soon to be married, she and her mother and stepfather had a conference with the family attorney, looking to an assurance that her fortune would be kept within the family. It was agreed that if she would create a trust reserving life estates first in herself and then in her mother and stepfather, remainder over to her issue, her mother would make a similar trust and her stepfather would include similar provisions in his will. This was a concerted family arrangement for keeping their respective fortunes in the line of descent should there be issue of the daughter; or, should there be no issue, passing the family fortune under a power of appointment to be exercised by will by the last survivor of the three. Pursuant to this plan the trust indentures were executed on January 14, 1936, by the mother and daughter in the presence of all three. The stepfather's will had been executed shortly before.

Petitioner, Meta Biddle Robinette, who was then fifty-five years old, executed an irrevocable trust indenture, the Pennsylvania Co. for Insurances on Lives & Granting

Annuities, Edward B. Robinette and George Earle Robinette being the trustees. To the trustees she transferred property having a market value of $193,546. The trustees were to pay the entire income to the grantor during her life, and on her death to her husband monthly, and on his death to her daughter monthly for life. Upon the termination of the life estates the trustees were to distribute the corpus to the issue of the daughter *per stirpes* upon their reaching, respectively, the age of twenty-one, and, in default of such issue, then to such persons in such proportions and for such estates as the survivor of the three should by will appoint.

At the same time, this petitioner executed a revocable trust indenture the provisions of which were the same as those of the irrevocable trust, and she transferred to the trustees certain securities.

Petitioner, Elise Biddle Robinson, who was then thirty years old, executed an irrevocable trust indenture, the Girard Trust Company, Edward B. Robinette and George Earle Robinette being the trustees. To the trustees she transferred property having a market value of $680,928.68. The trustees were to pay the entire income from the trust to the grantor during her life, and on her death to her mother and her stepfather, share and share alike, and on the death of either to the survivor. Upon termination of the life estates the trustees were to distribute the corpus to the issue of the grantor *per stirpes* upon their reaching, respectively, the age of twenty-one, and in default of such issue, then to such persons, and in such proportions and for such estates as the survivor of the three should by will appoint. Elise Biddle Robinson was married in April of 1936 and now has issue.

At the same time, this petitioner executed an irrevocable trust indenture, the Pennsylvania Co. for Insurances on Lives & Granting Annuities, Edward B. Robinette and George Earle Robinette being the trustees. The terms were identical with the Girard trust aforementioned ex-

cept as to the amount and classification of the properties. To the trustees she transferred property having a market value of $216,709.16. At the same time, she executed a revocable trust indenture to the same trustees, with the same provisions as the irrevocable trust, and transferred certain securities to the trustees.

The petitioners' gift tax returns for the calendar year 1936, filed on March 15, 1937, disclosed the irrevocable trust indentures of January 14, 1936, and claimed there was no gift tax liability.

The Commissioner determined that the life estates transferred to the husband and daughter were gifts by Meta Biddle Robinette, valued them at $57,958.40 and assessed a tax of $388.75 against her, which she paid about January 29, 1940. The Commissioner determined that the life estates transferred to the mother and stepfather were gifts by Elise Biddle Robinson, valued them at $48,635.52 and assessed a tax of $129.53 against her, which she paid about January 29, 1940.

Thereafter the Commissioner issued notices of deficiency, stating his determination that the remainder interests under each of the irrevocable trusts executed by them on January 4, 1936, were gifts, and determining an additional deficiency of $3,155.57 against Meta Biddle Robinette and $25,044.94 against Elise Biddle Robinson.

The value of the remainder in the Meta Biddle Robinette trust was fixed by the Commissioner at $104,381.29, after applying the remainder factor, .53931 for age fifty-five, to the value of the property transferred, and the value of the remainder in Elise Biddle Robinson's trusts was fixed by Commissioner at $274,829.78, after applying the remainder factor, .30617 for age thirty, to the value of the property transferred.

Upon review by the Board of Tax Appeals the determination of the Commissioner was reversed. (R. 9)

The Commissioner appealed to the Circuit Court of Appeals for the Third Circuit, and on March 23, 1942, that

Court entered its decision that the transfers of the remainder interests under the trusts constitute taxable gifts. On April 21, 1942, the Circuit Court granted a petition for rehearing filed by the grantors, and thereafter on July 30, 1942, entered its decision reaffirming its opinion of March 23, 1942, and further holding that each of the grantors made such a gift as rendered the whole remainder taxable, and that the cases were not required to be remanded to the Board of Tax Appeals for evaluation of the grantors' reversionary interests. The final decision of the Circuit Court of Appeals was therefore entered on July 30, 1942, and it is the decision of the Circuit Court of Appeals reversing the Board which the petitioners seek to review in this Court.

Reasons for Allowing the Writs

1. The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

The decision below, we respectfully submit, is sharply in conflict with the decisions of this Court in *Sanford's Estate* v. *Commissioner of Internal Revenue*, 308 U. S. 39, and *Burnet* v. *Guggenheim*, 288 U. S. 280.

This Court in *Sanford's Estate* v. *Commissioner*, supra, at page 42, held that the gift tax is supplemental to the estate tax, and the two must be construed together; that a transfer could not be subject to the gift tax unless before the grantor had fully parted with his interest in the property given; and that the test of the completeness of the tax gift was to be no different from that to be applied in determining whether the grantor has retained an interest such that it becomes subject to the estate tax upon its extinguishment at death.

According to *Burnet* v. *Guggenheim*, supra, at page 285, this Court held that the gift tax statute does not contemplate two taxes upon gifts not made in contemplation of

death, one upon the gift when a trust is created, or when the grantor's retained interest, if any, is relinquished, and another on the transfer of the same property at death because the gift previously made was incomplete, by reason of the grantor's retained interest.

The Circuit Court of Appeals below in subjecting the remainder interests herein to a gift tax despite the grantors' retained interests therein has therefore apparently rejected the principles laid down by the Supreme Court in the *Sanford's Estate* v. *Commissioner* and *Burnet* v. *Guggenheim cases*, supra.

2. The Circuit Court of Appeals below has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter.

The decision below, we respectfully submit, is sharply in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Commissioner* v. *McLean*, 127 F. (2d) 942. The Court of Appeals for the Fifth Circuit in the *McLean* case held that where certain trust instruments were executed simultaneously by the taxpayer and his wife authorizing trustee to pay annually any income of the trust to settlor's surviving spouse for life, with provision that the corpus and accumulated income should be distributed to taxpayer's daughter upon life beneficiary's death, and that if the daughter, predeceased by the beneficiary, left no surviving children or grandchildren, the trust estate should revert to the settlor, if living, unless the daughter left a will disposing of it, the possibility of reverter was not too remote to be valued for gift tax purposes and remanded the case to the Board of Tax Appeals with instructions to value the estates transferred in trust and deduct the value of the reversionary interest retained by the settlor.

The Circuit Court of Appeals below in deciding that the grantors herein made such a gift as makes the entire remainder taxable without deduction of the retained reversionary interests has therefore decided the instant cases contrary to the decision of the Circuit Court of Appeals for the Fifth Circuit in the *McLean* case, supra.

Prayer

For the foregoing reasons your petitioners pray that writs of certiorari issue out of this Court to the United States Circuit Court of Appeals for the Fifth Circuit commanding said Court to certify and send to this Court on a day to be determined a full and complete transcript of the record of all of the proceedings of such Circuit Court of Appeals had in this case, to the end that these causes may be reviewed and determined by this Court; that the judgments of the Circuit Court of Appeals be reversed; and that the petitioners be granted such other and further relief as may be proper.

META BIDDLE ROBINETTE,
ELISE BIDDLE PAUMGARTEN,
Petitioners,

By

HENRY A. MULCAHY,
GUILFORD S. JAMESON,
Their Attorneys.

Dated: October 24, 1942.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the Board of Tax Appeals is reported in 44 B. T. A. 701. (R. fols. 7 & 9)

The opinions of the Circuit Court of Appeals both upon the original appeal to that Court and upon the reargument therein are reported in 129 F. (2d) 832. (R. fols. 20 & 26, 39 & 42)

Jurisdiction

The judgments below were entered on July 30, 1942.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Statement of the Case

A summary statement of the facts is given in the petition, pages 3 to 6 above.

Statutes Involved

The statutes and regulations involved will be found in the Appendix, *infra*, pages 16 to 17.

Specification of Errors to be Urged

The Circuit Court of Appeals erred:

1. In holding that the transfers in trust here in issue by the terms of which the grantor provided that the income is to be paid to the grantor for life, then to two others for life, the remainder interest then to go to children, if any, when they reach 21, or, if none, then to the testamentary

appointees of the survivor of the grantor and the two others with life interests, are such transfers as are subject to the gift tax provisions of the Revenue Act of 1932 as amended; and in failing to hold that the transfers in trust here in issue are not subject to tax under the gift tax provisions of the Revenue Act of 1932 as amended.

2. In deciding that no allowance or deduction, for the value of a reversionary interest retained by the grantor, need be made in valuing a trust remainder for gift tax purposes; and in reversing the judgments of the Board of Tax Appeals.

ARGUMENT

1. The decision below is in conflict with the decisions of this Court in *Sanford's Estate* v. *Commissioner*, 308 U. S. 39, and in *Burnet* v. *Guggenheim*, 288 U. S. 280.

Heretofore it has been the generally accepted view that the gift tax is supplementary to the estate tax and that consequently a transfer is not to be taxed as a gift, if the grantor retains an interest in trust property, whether vested or contingent, sufficient to require the inclusion of the same in the grantor's gross estate subject to estate tax. In holding that the remainders herein are subject to gift tax the Circuit Court below has apparently rejected the heretofore accepted principle that the gift tax statute does not contemplate two taxes; and that a gift tax should not be imposed where it is evident that the transferred property will be subjected to an estate tax.

This view was forcefully expressed by this Court in *Sanford's Estate* v. *Commissioner of Internal Revenue*, 308 U. S. 39, 42, wherein the Court stated the following:

> "There is nothing in the language of the statute, and our attention has not been directed to anything in its legislative history to suggest that Congress had any purpose to tax gifts before the donor had fully parted with his interest in the property given, or that the test of the completeness of the taxed gift was to be any

different from that to be applied in determining whether the donor has retained an interest such that it becomes subject to the estate tax upon its extinguishment at death.

—The gift tax was supplementary to the estate tax. The two are in pari materia and must be construed together. Burnet v. Guggenheim, supra (288 U. S. 286, 77 L. ed. 751, 53 S. Ct. 369). An important, if not the main purpose of the gift tax was to prevent or compensate for avoidance of death taxes by taxing the gifts of property inter vivos which, but for the gifts, would be subject in its original or converted form to the tax laid upon transfers at death."

And in *Burnet* v. *Guggenheim*, 288 U. S. 280, 285, this Court stated:

"Congress did not mean that the tax should be paid twice, or partly at one time and partly at another. If a revocable deed of trust is a present transfer by gift, there is not another transfer when the power is extinguished. If there is not a present transfer upon the delivery of the revocable deed, then there is such a transfer upon the extinguishment of the power. There must be a choice, and a consistent choice, between the one date and the other."

In the light of the above cases we consider it appropriate to accentuate the fact that the reservation by a grantor of a life estate or a testamentary power of appointment (such as retained by the grantors in the instant cases) has been declared the occasion for the imposition of an estate tax upon the corpus of the trust (cf. 26 U. S. C. A., Sec. 811; *Helvering* v. *Bullard*, 303 U. S. 297; *Helvering* v. *Mercantile-Commerce Bank & Trust Co.*, 111 F. (2d) 224, cert. den. 310 U. S. 654; *Helvering* v. *Hallock*, 309 U. S. 106).

Despite the foregoing decisions of this Court, the Circuit Court of Appeals for the Third Circuit in the instant cases and the Circuit Courts of Appeals in the First, Second and Fifth Circuits in *Higgins* v. *Commissioner*, 129 F. (2d) 240; *Commissioner* v. *Marshall*, 125 F. (2d) 943, and *Commissioner* v. *McLean*, 127 F. (2d) 942, respectively, have rejected the decisions of this Court in the *Sanford* and *Gug-*

genheim cases, *supra*, thereby creating confusion and conflict in the gift and estate tax field. The resulting confusion caused Mr. Justice Hutcheson, writing for the Fifth Circuit, in the *McLean* case, *supra*, to comment as follows:

> "We think it clear that the provisions of the trust instruments as correctly summarized by the Board in its opinion, effected as to the donor, a taxable gift to the extent and value of the estates and interests in the property then transferred, and that the reservation by grantor of the possibility of reverter had no effect upon the completeness but only upon the value of the gift. We will therefore, without piling Pelion on Ossa, or vieing with Frank[4] in ancient or Clark[5] in modern, learning, or with either in erudition, general or particular, content ourselves with saying so. For, since Sanford and Hallock, supra, came down to confuse and confound followers and expounders of gift tax law, the voices of both board members and circuit judges are merely voices crying in the wilderness, and perhaps until the Supreme Court has spoken authoritatively on the question they would do best to decide the questions posed with as little bewordling and as few reasons as possible."

It is therefore respectfully submitted that the importance of the questions raised by the instant cases renders review in this Court necessary and desirable in order to dispose of the confusion which has arisen in the application of the gift and estate tax laws.

2. The decision below is in conflict with the decision of the Fifth Circuit Court of Appeals in the *Commissioner* v. *McLean* case, on the same matter.

The decision below, we respectfully submit, is sharply in conflict with the decision of the Circuit Court of Appeals in the Fifth Circuit in *Commissioner* v. *McLean*, 127 F. (2d) 942.

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[4] *Commissioner* v. *Marshall*, *supra*.

[5] *Commissioner* v. *Robinette* (instant cases).

The Circuit Court of Appeals below held in its decision, pages 835 and 836:

> "The taxpayers contend that at the least they are entitled to have the cases remanded to the Board to compute the value of the reversionary interest remaining in the grantor of each trust. This they contend must be deducted in order to furnish the proper determination of the value of the remainders. The Commissioner, on the other hand, contends that whatever either taxpayer has left by way of reversion is too contingent and remote to be valued. It is to be borne in mind that the question here is the valuation of the remainders created in each of these two deeds of trust. * * * The reversionary interests cannot in any way defer the time when the gifts will vest; nor can they defeat the latter. We think, therefore, that each of the respective settlors made such a gift as makes the whole taxable, subject, of course, to the reserved life estate. The cases do not need to be sent back for an evaluation of the reversionary interests."

The *McLean* case, *supra*, decided by the Fifth Circuit, involved the execution of reciprocal trusts, by a husband and wife, creating a life estate in a person other than the grantor and directing that the principal be distributed upon the death of the life tenant to the grantor's daughter; and, in the event the said daughter predecease the life tenant without issue, that the principal be paid to the life tenant. If, however, the daughter predecease the life tenant leaving issue, then to such issue upon the death of the life tenant. It was further provided that if none of such issue survived the life tenant or if said daughter, predeceased by the life tenant, left no issue, then the trust was to revert to the grantor if he or she be living unless the said daughter should leave a will disposing of the trust estate, in which event the trust was to go as her Will directed.

Hutcheson, J., writing for the Court, answered the same contention as made by the Commissioner in the instant cases, as follows:

> "Upon the question of its value the Commissioner contends that the entire value of the property dealt with in the transfers is includable as taxable gifts for 1934, either because the possibility of reverter was too remote to justify placing any value on it or, as was the case in Hughes v. Commissioner, 9 Cir., 104 F. 2d 144, because its value was not shown.
>
> With the first contention that the possibility of reverter was too remote to be valued we cannot agree, and there is even less merit in the second contention, that because it was not valued in the proofs, the Commissioner's valuation of the whole property must prevail in the face of our finding that the gift was not of the whole of it.
>
> The Board stating 'perhaps the transfers effected completed gifts of some estates less than a fee,' correctly stated 'the (Commissioner's) determination was not made on that basis, the values necessary to any such determination are not in the record and no such issue is suggested by the parties.' The Commissioner, having valued the property on a different theory, may not ask that the value he gave to it without regard to the reservation, be taken as its value, giving due regard thereto.
>
> The judgment of the Board while affirmed as to the 1933 taxes will be reversed as to those for 1934 and the cause as to those taxes will be remanded to it with instructions to value the estates transferred by the 1934 gift in trust, and redetermine the deficiencies accordingly" (p. 944).

Thus, in the instant cases, the Third Circuit Court of Appeals held the entire corpus of the trusts, after deduction of the primary life estates, subject to gift tax without excluding the value of the grantors' reversionary interests, whereas, in the *McLean* case, *supra*, the Fifth Circuit excluded the value of the reversion and applied the gift tax only upon the value of the remainders as such.

We respectfully submit that the two decisions are in sharp conflict on the same matter and the intervention of this Court is necessary to dispose of the confusion which has arisen by reason of the conflict, and so that uniformity of ruling may be secured.

CONCLUSION

The decision below probably being in conflict with the applicable decisions of this Court, and also in conflict with the decision of another Circuit Court on the same matter, such decision should be reviewed by this Court and a writ of certiorari should issue for that purpose as prayed in the foregoing petition.

Respectfully submitted,

HENRY A. MULCAHY,
GUILFORD S. JAMESON,
Attorneys for Petitioners.

APPENDIX

Revenue Act of 1932, C. 209, 47 Stat. 169

Section 501:

"(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

"(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; * * *" (U. S. C., Title 26, Sec. 550).

Internal Revenue Code, 26 U. S. Code, Sec. 811

Section 811. *Gross estate:*

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * * * *

"(c) *Transfers in contemplation of, or taking effect at death.* To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death with-

out such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;

* * * * * * *

"(f) *Property passing under general power of appointment.* To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of or intended to take effect in possession or enjoyment at or after his death, or (3) by deed under which he has retained for his life or any period not ascertainable without reference to his death or for any period which does not in fact end before his death (A) the possession or enjoyment of, or the right to the income from the property, or (B) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth; and"

* * * * * * *

Regulation 79, Art. 3:

"*Cessation of donor's dominion and control.*—The tax is not imposed upon the receipt of the property by the donee, nor is it necessarily determined by the measure of enrichment resulting to the donee from the transfer, nor is it conditioned upon ability to identify the donee at the time of the transfer. On the contrary, the tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable.

"As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to cause the beneficial title to be revested in himself, the gift is complete. But a transfer (in trust or otherwise), though passing both legal and beneficial title, is still in essence merely formal so long as there remains in the donor a power to cause the revesting of the beneficial title in himself, and the gift, from the standpoint of substance, remains incomplete during the existence of the power. * * *"